STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 7, 2008
v	No. 245099 Van Buren Circuit Court
JUNIOR FRED BLACKSTON, Defendant-Appellant.	LC No. 00-011976-FC ON SECOND REMAND

Before: Markey, P.J., and Owens and Servitto, JJ.

PER CURIAM.

This case is now before this Court for the third time[1], on second remand from our Supreme Court. *People v Blackston*, 481 Mich 451; 751 NW2d 408 (2008) (*Blackston III*). Defendant has twice been convicted after jury trials of first-degree premeditated murder, MCL 750.316, in the death of Charles Miller. After defendant's first conviction, he moved for and the trial court granted a new trial on the basis of errors made in informing the jury regarding immunity granted to prosecution witness Guy Carl Simpson. At defendant's second trial, the trial court ruled that the prior testimony of Simpson and Darlene Rhodes Zantello during the first trial was admissible under MRE 804(b)(1) but that their subsequent recanting statements were not. After his second conviction, defendant moved again for new trial, arguing for the first time that the witnesses' recanting statements should have been admitted under MRE 806. The trial court denied the motion because, although the recanting statements could have been admitted under MRE 806, the court would have excluded them under MRE 403 because their probative value was outweighed by undue prejudice. See *Blackston III*, *supra* at 457-458.

This Court twice reversed and remanded for a third trial.[2] Our Supreme Court, however, held that "the trial court acted within its discretion when it excluded the recantations and denied

[1] Judge Deborah A. Servitto was randomly assigned to this panel to replace Judge Helene N. White who now sits on the United States Sixth Circuit Court of Appeals.

[2] In *People v Blackston*, unpublished per curiam opinion of the Court of Appeals, issued January 1, 2005 (Docket No. 245099) (*Blackston I*), this Court held that the trial court erred in not admitting the impeachment evidence and that it was more probable than not that the error was outcome determinative. Our Supreme Court, in lieu of granting leave to appeal, vacated *Blackston I* and remanded the case to this Court to determine whether "the trial court's error, if

(continued…)

defendant's motion for a new trial. Further, any error that may have occurred was harmless." *Id*. at 454. Accordingly, our Supreme Court reversed this Court's decision and remanded this case to this Court for "consideration of any remaining issues advanced by defendant in his claim of appeal." *Id*. Having considered defendant's remaining issues in light of *Blackston III*, we conclude they are all without merit. Consequently, we now affirm.

In his claim of appeal, the first two issues defendant asserts are (1) that the trial court abused its discretion by denying defendant's motion for a new trial because Simpson's and Zantello's recanting statements were admissible under MRE 806 and MRE 403 and (2) that denying admission of the statements violated defendant's constitutional right to confront witnesses presented against him. The first issue has already been decided against defendant in *Blackston III*, *supra* at 454, 460-463, 473. As to the second issue, our Supreme Court acknowledged defendant's Confrontation Clause claim but declined to address it. *Id*. at 459. The Supreme Court held that any error regarding excluding evidence to impeach the testimony of Simpson and Zantello was harmless under both the standard of review for non-constitutional error (harmless unless more probable than not outcome determinative) and for constitutional error (harmless beyond a reasonable doubt) when considered in light of the remaining untainted evidence, i.e., assuming the jury would have completely discredited the Simpson's and Zantello's testimony. *Id*. at 459-460, 469-470. Thus, even if defendant had preserved his constitutional claim at trial and error occurred, our Supreme Court has determined any error was harmless beyond a reasonable doubt. Thus, neither of defendant's first two issues comes within the scope of the remand order to consider "defendant's remaining issues on appeal." *Id*. at 474.

Defendant's third issue in his claim of appeal is that the trial court abused its discretion by declaring Simpson unavailable to testify at the second trial because the trial court did not order Simpson to testify pursuant to MRE 804(a)(2) before declaring him unavailable. This issue fails for the same reason as defendant's second issue: our Supreme Court has already held that any error with respect to Simpson's testimony was harmless.

In addition, both this Court and our Supreme Court in addressing whether the trial court erred in excluding the recanting statements of Simpson and Zantello assumed that the trial court properly declared each witness unavailable and properly admitted their testimony from the first trial at the second trial. Thus, our Supreme Court in *Blackston III* necessarily decided this issue because in order to decide whether the trial court abused its discretion by excluding Simpson's recanting statement, our Supreme Court had to determine that the trial court correctly found that Simpson was unavailable. So, his testimony from the first trial was admissible under MRE 804(b)(1). On that basis, our Supreme Court's decision would constitute the law of the case. The law of the case doctrine mandates that a court not decide a legal question differently where

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(…continued)

any, in excluding the statements in question was harmless beyond a reasonable doubt." 474 Mich 915; 705 NW2d 343 (2005). In *People v Blackston (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2007 (Docket No. 245099) (*Blackston II*), this Court again reversed defendant's conviction and remanded for a new trial. This Court found that the trial court's refusal to allow defendant to impeach the prior testimony of Simpson and Zantello with their recanting statements was error, and that the error was not harmless beyond a reasonable doubt. *Blackston II*, slip op at 6-9.

the facts remain materially the same. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). The law of the case doctrine applies both to questions specifically decided in the earlier decision and to questions necessarily determined to arrive at the decision. *Id*.

Moreover, this issue fails from its own lack of merit. Simpson appeared at defendant's second trial but initially refused to testify until he had an opportunity to confer with his counsel. The trial court granted Simpson time to do so; thereafter, Simpson refused to testify unless he was given the opportunity to take a shower.[3] Simpson repeatedly refused to testify, notwithstanding the trial court's attempts to accommodate him. A trial court is not required to threaten a witness with contempt before finding him unavailable to testify. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980). Simpson's counsel informed the trial court that he believed Simpson would jeopardize his grant of immunity by testifying[4] and implied that he (counsel) would advise Simpson to assert his Fifth Amendment privilege if called. A witness who asserts a Fifth Amendment privilege is unavailable to testify for purposes of MRE 804(a). *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). In light of these facts, we cannot say that the trial court abused its discretion by declaring Simpson unavailable to testify at defendant's second trial.

Defendant next asserts that he was denied the effective assistance of counsel at trial because (1) counsel failed to object to inadmissible hearsay contained in Zantello's testimony from the first trial; (2) counsel failed to object to the trial court's *sua sponte* instruction on perjury, and (3) counsel did not object to an erroneous instruction to the jury on the order of their deliberations. We disagree that but for any of these alleged errors of counsel it is reasonably probable that the outcome of the trial would have been different.

Defendant did not move for a new trial on this ground and did not seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id*. at 423-424. Counsel must have erred so seriously that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel is presumed to have afforded effective assistance, and the defendant bears a heavy burden of proving otherwise. *Id*.; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[3] Simpson was being held in jail on unrelated charges, and asserted that he had not been given an opportunity to shower while at the jail.

[4] Apparently, Simpson's counsel had learned that Simpson intended to testify differently from what he had at the first trial.

Zantello testified that on the night of the incident she was sleeping in the home she shared with defendant when she heard defendant and Simpson enter the home. She was asked whether she heard Simpson remark to defendant that he (defendant) almost blew off Miller's head. Zantello asserted that she recalled that she heard something to that effect, but that because she did not know at that point what had happened to Miller, she did not understand the context of the remark. Defense counsel did not object to the exchange at defendant's first trial. At the second trial, defense counsel also did not object when this testimony was read into the record.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided in the Michigan Rules of Evidence. MRE 802. Here, the prosecutor offered Simpson's statement that defendant almost blew off Miller's head for the truth of the matter asserted, i.e., that defendant killed Miller. We can conceive no other reason for the prosecutor to have elicited that particular testimony from Zantello. Thus, the statement constituted hearsay that was inadmissible unless another rule applied. MRE 801(c); MRE 02. The prosecutor argues that the statement was admissible has an admission.

When a party has manifested an adoption of or a belief in the truth of a statement made by another, that statement is admissible as an admission by a party-opponent. MRE 801(d)(2)(b); *People v Dietrich*, 87 Mich App 116, 131; 274 NW2d 472 (1978), rev'd in part on other grounds 412 Mich 904; 315 NW2d 123 (1982). "[A]doptive admissions are admissible when it clearly appears that the defendant understood and unambiguously assented to the statement made." *Id*. at 131. But there is no evidence that defendant verbally assented to Simpson's statement or engaged in any nonverbal conduct that manifested his unambiguous assent to it. Consequently, we reject the prosecutor's argument that the evidence established that defendant adopted the statement, making it an admission. Thus, we conclude that trial counsel erred by failing to object to this portion of Zantello's testimony.

Nevertheless, reversal is not warranted because defendant cannot establish counsel's error resulted in prejudice. Our Supreme Court has already determined that any error with respect to Zantello's testimony was harmless in light of the other, properly admitted evidence against defendant, including the testimony given by Charles Dean Lamp, Rebecca Krause Mock, and Roxanne Krause Barr. See *Blackston III*, *supra* at 469-473. Therefore, we conclude that it is not reasonably probable that the result of the trial would have been different had counsel objected and prevented the introduction of this portion of Zantello's testimony. *Carbin*, *supra* at 600. This argument fails.

Defendant next argues that the trial court's *sua sponte* instruction on perjury improperly focused the jury's attention on Simpson's motive to tell the truth. For this reason, defendant contends that counsel rendered ineffective assistance by failing to object to the instruction.

Following closing arguments and immediately preceding final instructions, the trial court instructed the jury on the law pertaining to the crime of perjury. Defense counsel did not object to the instruction on perjury and voiced no objections to the instructions as a whole. We review defendant's underlying claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

We conclude that the trial court did not clearly err by instructing the jury on the offense of perjury. During closing argument, defense counsel argued that Lamp lied while testifying in order to preserve his plea agreement. On rebuttal, plaintiff countered that Lamp had a motive to testify truthfully, because if he did not do so, he risked being charged with perjury. Given that the parties discussed perjury and witness motives for testifying truthfully during closing arguments, the trial court acted within its discretion by informing the jury of the law pertaining to that offense. A trial court has the duty to instruct the jury on the law applicable to the case, MCL 769.29, and to ensure that the jury clearly understands what issues it is to decide. *People v Townes*, 391 Mich 578, 587; 218 NW2d 136 (1974). No clear error occurred and defense counsel did not render ineffective assistance by failing to object to the instruction. Counsel was not required to make a meritless objection. *Snider*, *supra* at 425.

Defendant's final claim in his appeal of right is that counsel rendered ineffective assistance by failing to object to an instruction defendant contends told the jury that it was required to determine that an element of first-degree murder had not been proven beyond a reasonable doubt before it could consider the lesser charge of second-degree murder.

We agree with defendant that jurors need not agree unanimously that an accused is not guilty of a principal charge before considering a lesser charge. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). But we disagree with defendant's understanding of the trial court's instruction, which did not inform the jury that it must reach a verdict on the principal charge of first-degree murder before it could consider the lesser charge of second-degree murder. Instead, the instruction merely set out the three possible verdicts: not guilty, guilty of first-degree murder, or guilty of second-degree murder. The instruction did not clearly violate *Handley*. Counsel did not render ineffective assistance by failing to object because counsel was not required to make a meritless objection. *Snider*, *supra* at 425.

Defendant, acting *in propria persona*, raises a plethora of additional issues on appeal.

Defendant first argues that he was deprived of his right to be free from double jeopardy when he was tried a second time on the charge of first-degree murder in the killing of Miller. Defendant contends that during the first trial, the prosecutor engaged in deliberate misconduct designed to provoke a mistrial and prevent a likely acquittal. Further, defendant argues, his counsel rendered ineffective assistance by failing to move for dismissal on double jeopardy grounds. We disagree.

Defendant's double jeopardy claim presents a question of law we review de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). Because this issue is unpreserved, our review is limited by the plain error doctrine. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture, an error must have occurred, the error must have been plain, and the plain error must have affected the defendant's substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). This includes protecting against a second prosecution for the same offense after conviction. *Smith*, *supra* at 299. Here, it is undisputed that defendant was convicted of murdering Miller at his first trial and then tried again for the same offense. But

the constitutional protection against double jeopardy does not preclude retrial when a defendant seeks and obtains a new trial after having been convicted. *People v Fochtman*, 226 Mich 53, 56; 197 NW 166 (1924); *People v McKinley*, 32 Mich App 178, 180; 188 NW2d 238 (1971). "It is well established that the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than the insufficiency of the evidence to support the verdict." *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991).

But the constitutional protection against double jeopardy also protects a defendant's valued right to have his trial completed by a particular tribunal. *People v Tracey*, 221 Mich App 321, 328; 561 NW2d 133 (1997). Thus, when a trial ends before a verdict is reached - - when a mistrial is declared - - double jeopardy may bar a retrial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). After a mistrial has been declared, "retrial is permissible under double jeopardy principles in two circumstances: (1) where there was 'manifest necessity' to declare the mistrial or (2) where the defendant consented to the mistrial and was not goaded into consenting by intentional prosecutorial misconduct." *Tracey*, *supra* at 326. Thus, generally, when a defendant moves for or consents to a mistrial, a second trial is not precluded "on the premise that by making (sic) or consenting to the motion the defendant waives a double jeopardy claim." *Dawson, supra* at 253. So, only when a prosecutor's misconduct "is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon v Kennedy*, 456 US 667, 676; 102 S Ct 2083; 72 L Ed 2d 416 (1982). This exception is "limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id*. at 679. A defendant who has sought or consented to a mistrial who seeks to invoke this exception to prevent a new trial must establish the prosecutor's intent from the objective facts and circumstances of the particular case. *Id*. at 675 (Rehnquist, C.J.), 680 (Powell, J., concurring); See also *Dawson, supra* at 257.

Defendant argues for an extension of the *Kennedy-Dawson* exception to the facts of his first trial where confusion over the extent of immunity granted to Simpson prompted a defense motion for mistrial that was denied. The alleged misconduct defendant asserts is that the prosecutor remained silent when the trial judge stated Simpson was granted use immunity rather than full transactional immunity, which the witness insisted he had been granted.[5] Because a verdict was reached in defendant's first trial, that part of the double jeopardy protection the *Kennedy-Dawson* exception is designed to enforce was not infringed. See *United States v Wallach*, 979 F2d 912, 916 (CA 2, 1992). Further, this Court has held it is error to apply the principles developed in the context of mistrials to a defendant's motion for a new trial after a verdict has been rendered in a first trial. *Langley*, *supra* at 150.

[5] Defendant in his pro per brief acknowledges that the prosecutor told the jury during his opening statement in the first trial that because of immunity granted to him, "Simpson cannot be prosecuted for any participation he had in the death of Charles Paul Miller. He has to testify truthfully, but if he does that, he will suffer no legal jeopardy for his role in the death of Charles Paul Miller." This is a statement of transactional, not use, immunity.

Defendant, however, argues for an extension of the *Kennedy-Dawson* exception based on dicta in *Wallach*. The *Wallach* Court suggested that the rationale of *Kennedy* might apply to preclude retrial "where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct." *Wallach*, *supra* at 916. Defendant cites no binding precedent for an extension to Michigan jurisprudence of the *Wallach* dictum, and we decline to do so. Further, even if we were to apply the *Wallach* dictum, defendant's claim fails on the merits. At worst, the prosecutor failed to correct the misapprehension of the trial court regarding the extent of immunity granted to Simpson, but there exists no objective basis to infer that the prosecutor intended through silence to "goad" defendant into moving for a mistrial. Additionally, for the reasons discussed in *Blackston III*, *supra* at 469-473, there is no objective basis to infer that the prosecutor apprehended an acquittal. So, even if it applied, the *Wallach* dictum does not benefit defendant.

To succeed in his double jeopardy claim, defendant must satisfy two burdens. First, that plain error occurred regarding intentional prosecutorial misconduct. Second, defendant must prove the factual predicate of his claim of ineffective assistance of counsel. *Carbin*, *supra* at 600. As to both, defendant bears the burden of persuasion with respect to prejudice. *Id*.; *Carines*, *supra* at 763. But defendant has not established intentional misconduct on the part of the prosecutor, and nothing in the record indicates that the attorney who represented defendant in his first appeal considered that a motion for a new trial was improper. Defendant has not established that plain error occurred, *Carines*, *supra* at 763, nor has he overcome the presumption of effective assistance of counsel, *Carbin*, *supra* at 600. "[D]efense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

Next, defendant asserts several constitutional and evidentiary claims regarding the admission of Simpson and Zantello's prior testimony. For the reasons already discussed, most of these claims were necessarily decided in *Blackston III*, which constitutes the law of the case. *Webb*, *supra* at 209. Even if error occurred, it was harmless under any standard. *Blackston III*, *supra* at 454, 460, 469-473. Nevertheless, we briefly note defendant's arguments.

Defendant argues that the trial court abused its discretion by allowing Simpson's testimony from the first trial to be read at the second trial because (1) defendant did not have an opportunity to fully cross-examine Simpson at the first trial, especially regarding Simpson's immunity agreement, (2) defendant did not have a similar motive to develop Simpson's testimony at the second trial, because Simpson had recanted the testimony he gave at the first trial, (3) the probative value of the former testimony was substantially outweighed by the danger of unfair prejudice because the testimony had been recanted, and (4) the former testimony did not have a sufficient indicia of reliability because it had been recanted. These arguments are all frivolous. Defendant had a full opportunity to cross-examine Simpson at the first trial, defendant's motive with respect to Simpson's testimony was identical at each trial, and evidence is not unfairly prejudicial because it tends to establish the fact it was introduced to prove. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995). Admissibility under the Confrontation Clause is not determined by indicia of reliability; rather, the admission of testimonial statements of a witness who does not appear at trial requires that the declarant must be unavailable to testify, and the defendant must have had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct

1354; 158 L Ed 2d 177 (2004). These conditions were satisfied with respect to Simpson's testimony.

Defendant also argues that the trial court abused its discretion by not redacting the confusing discussion regarding the scope of immunity granted to Simpson. We conclude the trial court's actions were within the range of principled outcomes, and thus, not an abuse of discretion. In fact, the trial court explained the nature of the misunderstanding to the jury prior to the reading of that portion of Simpson's testimony in which the immunity agreement was discussed. The trial court also informed the jury that Simpson's belief regarding the extent of the immunity granted him was correct. No plain error occurred. *Carines, supra* at 763.

If it were not already decided by *Blackston III*, we would hold that the trial court did not abuse its discretion by declaring Zantello unavailable to testify at defendant's second trial. Zantello stated that she could not recall the events surrounding Miller's disappearance in 1988 and could not recall her testimony at the first trial. The trial court's comments indicate that it found Zantello's protestations of lack of memory to be less than credible. In addition to Zantello repeatedly stating that she could not remember either the events surrounding Miller's disappearance or her testimony from the first trial, she also repeatedly stated that she wished to avail herself of her Fifth Amendment protections. Consequently the trial court properly determined that Zantello was unavailable to testify. See *Meredith, supra* at 65-66.

Defendant next argues that the trial court abused its discretion by excluding other evidence offered to impeaching Simpson and Lamp. We disagree.

With respect to Simpson, defendant submits the affidavits of three prospective witnesses, Shirley Gargus, Jeff Pare, and Linda Johnson, and a letter from a prison inmate, John W. Reed, each of whom would allegedly have testified to statements Simpson made that were inconsistent with his trial testimony. We conclude that any error that may have occurred was harmless for the reasons stated in *Blackston III, supra* at 469-473.

Defendant also submits the affidavits of four witnesses who would allegedly have testified so as to impeach Lamp: Donald Ford, Henry Dale Kirby, Corey Leadingham, and Linda Johnson. The trial court ruled the testimony inadmissible because Lamp had not been afforded the opportunity to explain or deny the alleged statements. MRE 613(b). We conclude with respect to Johnson's proposed testimony that because the offer of proof is vague and context dependent, [6] the trial court's decision to exclude her testimony under MRE 613(b) was within the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Defendant did not attempt to question Lamp about the statements when Lamp testified and did not request that the trial court attempt to recall Lamp. Under the

[6] For example, Johnson states that defendant and Lamp were at her house and defendant stated the police wanted to talk to him and Lamp about Simpson. Johnson asked if defendant was going to jail and Lamp purportedly stated, "No [.] Blackston's not going to jail! He had nothing to do with what the Detective's want to talk about."

circumstances, the trial court did not abuse its discretion by excluding the evidence, and no plain error occurred. *Carines*, *supra* at 763-764.

Having reviewed the affidavits of the three other witnesses proposed to impeach Lamp, we do not find their proposed testimony did not offer evidence of inconsistent statements Lamp made. They simply set forth other allegations of threats or violence. As such, the testimony would not be relevant to impeach Lamp's testimony; rather, the offered testimony was inadmissible character evidence. Moreover, to the extent the alleged instances of misconduct might be marginally probative of veracity, the evidence would be subject to exclusion because of its unfairly prejudicial nature. MRE 403. "This Court will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason." *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

Next, defendant asserts prosecutorial misconduct warrants a new trial. Specifically, defendant argues that the prosecutor improperly referred to him as a "cold-blooded murderer" during opening statement, and during closing argument, the prosecutor used phrases such as "I would suggest" and "I don't believe" to personally vouch for the credibility of Simpson and Lamp. We disagree. None of these unpreserved claims of error warrants reversal.

We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). When examining the propriety of a prosecutor's remarks, we must evaluate them in context. *Id*. Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless the defendant demonstrates the existence of plain error that affected his substantial rights. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 448-449. Error requiring reversal will not be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *Id*. at 449.

During opening statement, the prosecutor explained that Lamp would testify pursuant to a plea agreement that allowed him to plead guilty to the crime of manslaughter. The prosecutor acknowledged that Lamp's motivation for testifying would be a factor for the jury to consider, but then indicated that he did not mean to paint Lamp as "anything other than a cold-blooded murderer, just like Mr. Blackston, because that's what they are." In context, then, the comment related more to Lamp than to defendant, i.e., that although Lamp had been given a plea bargain, he and defendant were equally culpable for the murder. Moreover, because defendant was charged with first-degree, premeditated murder, which could be referred to as "cold-blooded murder" to distinguish it from the crime of manslaughter committed in the heat of passion, or second-degree murder based on lesser forms of malice, it is doubtful the comment was prejudicial to defendant. To the extent the remark was intended to inflame the jury, any prejudice to defendant could have been cured by a timely objection and a curative instruction. *Ackerman*, *supra* at 449.

A prosecutor may not vouch for the credibility of a witness by suggesting that he has some special knowledge that the witness testified truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue from facts in evidence that a

witness is worthy or unworthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). During closing argument, the prosecutor used phrases such as "I would suggest" and "I don't believe" when discussing testimony given by Simpson and Lamp. In context, we do not read these comments as the prosecutor's suggesting that he had special knowledge that Simpson and Lamp testified truthfully. Rather, the prosecutor was discussing the witnesses' motive to testify and stated that the other evidence suggested that Simpson and Lamp testified truthfully. Thus, the prosecutor's remarks considered in context were not improper.

In sum, either the remarks about which defendant now complains were proper, or any prejudice could have been cured by timely objections and curative instructions. *Ackerman*, *supra* at 449. No plain error warranting reversal occurred. *Carines*, *supra* at 763-764.

Defendant's penultimate argument is a compliation of all his prior arguments as ineffective assistance of counsel. Specifically, defendant asserts his counsel rendered ineffective assistance by failing to: (1) move to dismiss the charge of murder and to bar a second trial on double jeopardy grounds; (2) object to the admission of Simpson's prior testimony (including that portion of the testimony in which the parties expressed confusion about the immunity agreement), the admission of Zantello's prior testimony; the exclusion of extrinsic impeachment evidence; and several instances of prosecutorial misconduct; (3) cross-examine and impeach several key witnesses (Simpson, Zantello, and Lamp) with prior inconsistent statements; (4) examine defense witness Shirley Gargus regarding inconsistent statements made by Zantello; (5) call defense witnesses to impeach Zantello and Simpson with inconsistent statements, and (6) offer character evidence to portray Zantello and Lamp as untruthful and dishonest. These claims all lack merit.

As noted already, defense counsel is presumed to have afforded effective assistance, and defendant bears a heavy burden of proving otherwise. *Rockey*, *supra* at 76. To meet this burden, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Snider*, *supra* at 423-424. But based on *Blackston III*, *supra*, and our analysis of defendant's remaining issues, it has been determined that almost all of the underlying issues that defendant now asserts were errors of counsel either were not errors, or were harmless. Consequently, defendant cannot establish either the necessary element that an error of counsel occurred or that the alleged error resulted in prejudice. Defendant cannot overcome the presumption of effective assistance of counsel without showing both. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The only additional argument defendant raises is counsel's failure to impeach Lamp and Zantello with character evidence that they had reputations for being untruthful. However, the decision regarding what evidence to present constitutes trial strategy and results in ineffective assistance only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). But our Supreme Court has already determined in *Blackston III*, *supra* at 470, that even if the jury had completely

discredited Zantello's testimony, there would not have been a different outcome. Defendant cannot establish ineffective assistance of counsel with respect to impeaching Zantello.

As to Lamp, he testified pursuant to a plea agreement which allowed him to plead guilty to manslaughter and receive a maximum term of 15 years in prison. Counsel brought to the jury's attention Lamp's self-interest in implicating defendant in Miller's murder. Moreover, counsel cross-examined Lamp about various inconsistent statements. Furthermore, given that the presentation of character evidence against Lamp was unsuccessful at defendant's first trial, it is likely that defense counsel (who also represented defendant at the first trial) made a strategic decision to forego offering such evidence at the second trial and to concentrate on creating doubts about Lamp's testimony because of his plea agreement. This Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Last, defendant argues that the cumulative effect of the errors he alleges deprived him of his right to due process and a fair trial. This argument has no merit.

In order to reverse on grounds of cumulative error, the errors must be of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *Ackerman*, *supra* at 454. Because seriously prejudicial error has not been identified in this case, there can be no cumulative effect of errors meriting reversal. *Rice*, *supra* at 448. Any errors that did occur were minor and did not deny defendant due process and a fair trial.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Deborah A. Servitto